

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

VERVAIN, LLC	*	
	*	November 22, 2022
VS.	*	
	*	CIVIL ACTION NOS.
MICRON TECHNOLOGY, INC.,	*	W-21-CV-487
ET AL	*	
WESTERN DIGITAL	*	W-21-CV-488
CORPORATION, ET AL		

BEFORE THE HONORABLE ALAN D ALBRIGHT
DISCOVERY HEARING (via Zoom)

APPEARANCES:

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18 Proceedings recorded by mechanical stenography,
19 transcript produced by computer-aided transcription.
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01:31 1 (Hearing begins.)

01:31 2 DEPUTY CLERK: A civil action in Cases
01:31 3 6:21-CV-487 and 488, Vervain, LLC versus Micron
01:31 4 Technology, Inc., et al. Cases called for a discovery
01:31 5 hearing.

01:31 6 THE COURT: Mr. Whitehurst, if you could
01:31 7 announce, please.

01:31 8 MR. WHITEHURST: Good afternoon, Your
01:31 9 Honor. Alan Whitehurst from McKool Smith for the
01:31 10 plaintiff Vervain. And with me today is my colleague
01:31 11 Chris McNett.

01:31 12 THE COURT: Welcome.

01:32 13 MR. WHITEHURST: Thank you.

01:32 14 MR. LANG: Good afternoon, Your Honor.
01:32 15 Jason Lang on behalf of the Micron defendants. With me
01:32 16 are my colleagues Parth Sagdeo and Chris Childers and
01:32 17 Micron in-house legal representative Anne-Marie Dega.

01:32 18 And a computer glitch has her picture
01:32 19 showing Byrne.

01:32 20 THE COURT: Mr. Jones?

01:32 21 MR. JONES: Your Honor, Mike Jones for
01:32 22 Western Digital, together with Rick Frenkel.

01:32 23 MR. FRENKEL: Good morning.

01:32 24 THE COURT: Have I left anyone out?

01:32 25 It's everyone I can see on my screen. Is

01:32 1 there anyone else?

01:32 2 MR. LANG: I think that's all, Your
01:32 3 Honor.

01:32 4 THE COURT: Very good.

01:32 5 So I'm going to mess you all up a little
01:32 6 bit here, I think, by doing this, but I've looked over
01:32 7 everything. I'd like to take up the fourth and fifth
01:32 8 issues together and out of order.

01:32 9 The first four -- No. 4 is whether the
01:32 10 Court should order Vervain or Greenthread to produce
01:33 11 purchase price of Greenthread shares when Greenthread
01:33 12 owned the asserted patents, and then whether -- No. 5,
01:33 13 whether the Court should order Vervain or Greenthread
01:33 14 to produce the purchase price of Greenthread shares
01:33 15 when Greenthread owned the asserted patents.

01:33 16 I'm happy to hear from the defendant why
01:33 17 they think at this point they're entitled to that
01:33 18 information.

01:33 19 MR. LANG: Sure. And unfortunately,
01:33 20 Ms. Dega, this will be a time you'll have to leave the
01:33 21 hearing.

01:33 22 Thank you, Your Honor. I'll share my
01:33 23 screen here.

01:33 24 And ironically, I actually was going to
01:33 25 ask that we address this issue first because it's very

01:33 1 straightforward.

01:33 2 There was a 10 percent sale of
01:33 3 Greenthread. So 10 percent of the company was sold.
01:33 4 When that sale occurred, Greenthread owned the asserted
01:34 5 patent and one other group of patents, had no other
01:34 6 operations. So that 10 percent -- what that 10 percent
01:34 7 of the company sold for reflects the value of the
01:34 8 asserted patent.

01:34 9 How do we know that, Your Honor? Well,
01:34 10 Federal Circuit precedent has already held -- this is
01:34 11 the Integra case -- where they had looked at the sale
01:34 12 of a company (audio distortion). And, in fact, the
01:34 13 Federal Circuit relied on that sale price when they
01:34 14 were looking at the damages award.

01:34 15 Now, Vervain has said, well, that's
01:34 16 not -- these patent purchases aren't relevant to the
01:34 17 case. The Court hasn't been ordering production of
01:34 18 those. That just is not the case, Your Honor.

01:34 19 This is Vervain's position just since
01:34 20 September of this year. They said: Documents
01:34 21 regarding an acquisition involving patents transferred
01:34 22 are relevant for damages purposes.

01:34 23 And they asked for that for Round Rock.
01:35 24 And what did the Court order with respect to Round
01:35 25 Rock? It's at the bottom there: Micron is ordered to

01:35 1 produce any sales documents.

01:35 2 And that's exactly what Micron produced
01:35 3 was the Round Rock sales agreement for patents.

01:35 4 So this is a sale of a company for the
01:35 5 asserted patent. It's relevant, and Greenthread -- or
01:35 6 Vervain's asked for this themselves and the Court's
01:35 7 ordered this as production.

01:35 8 The next issue is basically the same.
01:35 9 It's a 3 percent sale of the company.

01:35 10 If you have no further questions, Your
01:35 11 Honor, that's all that I have.

01:35 12 THE COURT: And a response,
01:35 13 Mr. Whitehurst or whoever's going to respond?

01:35 14 MR. WHITEHURST: Your Honor, we certainly
01:35 15 have not asked for the price put on the minority shares
01:35 16 of a third party. We believe that -- we struggle to
01:36 17 see how this could possibly be relevant to the
01:36 18 hypothetical negotiation.

01:36 19 We're talking about past corporate
01:36 20 information for a third party, Greenthread. We're not
01:36 21 talking about the plaintiff here, Vervain.

01:36 22 And when you look at this, the case that
01:36 23 counsel cites to was the purchase price for the entire
01:36 24 company. That's not what we're looking at here.

01:36 25 The defendants are trying to obtain the

01:36 1 amount that was paid to two minority shareholders that
01:36 2 had provided some capital and subsequently wanted out
01:36 3 of the company.

01:36 4 So we're talking about a very different
01:36 5 situation here. This is not like what we dealt with in
01:36 6 the Lexar Media or Round Rock situation, where we're
01:36 7 talking about licenses for comparable patents. We've
01:36 8 understood the role of the case. You produce executed
01:36 9 licenses. We followed that to the letter of the law.

01:36 10 Here, they're trying to get to how much
01:36 11 Greenthread, a third party, paid to two minority
01:37 12 shareholders or in the case of --

01:37 13 THE COURT: Mr. Whitehurst, I'm sorry.

01:37 14 Mr. Lang, yeah. If -- I'm sorry to cut
01:37 15 you off, Mr. Whitehurst.

01:37 16 Mr. Lang, I'm trying to figure out what
01:37 17 theory -- I get this is discovery, and I guess you
01:37 18 could argue that, you know, this is -- has some
01:37 19 tangential relevance and that, you know, that if the
01:37 20 plaintiff is unhappy, they can, you know, Daubert,
01:37 21 summary judgment or whatever.

01:37 22 But I'm having a hard time figuring out
01:37 23 what reasonable royalty issue that this would go to.
01:37 24 I'm -- I can't figure out where -- I can't figure out
01:37 25 what these gentlemen -- I'm assuming -- I think they

01:37 1 were both gentlemen. Let's see --

01:38 2 MR. WHITEHURST: There were two in the
01:38 3 2019 time frame, and there was one in the 2013 before
01:38 4 the patents had even issued.

01:38 5 THE COURT: Yeah. Now, let me say this:
01:38 6 Is Dr. Rao, R-a-o, is he an inventor of the patents
01:38 7 that are involved in the case?

01:38 8 MR. LANG: Yes, Your Honor. The sole
01:38 9 inventor.

01:38 10 THE COURT: Okay. So -- okay. So Mr. --
01:38 11 so if you would, Mr. Lang, tell me what you -- where
01:38 12 you think this is relevant with any of the reasonable
01:38 13 royalty factors, and then I'll hear from Mr. Whitehurst
01:38 14 why providing the information of what the inventor
01:38 15 received would not be relevant.

01:38 16 MR. LANG: Okay. Because the 10 -- it
01:38 17 was a sale for 10 percent of the interest of the
01:38 18 company.

01:38 19 So from that, you can back out, well, if
01:38 20 you -- if that's just 10 percent, so the full price
01:38 21 would be, you know, 100 percent. So a damages expert
01:38 22 could back out, well, what would be the value of the
01:39 23 sale of the company at that point?

01:39 24 And the Federal Circuit absolutely has
01:39 25 said that you can look at this when you compare the

01:39 1 royalty. In this case, in the Integra case, there is a
01:39 2 \$15,000 (sic) royalty that was testified to.

01:39 3 And they compared that to the sale of the
01:39 4 company, which was 20 million. And the Federal Circuit
01:39 5 concluded, well, the 15 million would therefore not be
01:39 6 a reasonable royalty.

01:39 7 So here, the only math that needs to be
01:39 8 done, Your Honor, is -- Mr. Whitehurst brought up two
01:39 9 things. Well, it's a third party. It was a third
01:39 10 party that owned the asserted patent family. And you
01:39 11 rightly pointed out the issue with Dr. Rao.

01:39 12 So this is the asserted patent, and it's
01:39 13 a sale of 10 percent of the company. That's true. But
01:39 14 it's easy to take 10 percent and turn that into 100.
01:39 15 That's just math.

01:39 16 And then you can compare that price to
01:39 17 any royalty that's testified to, as the Federal Circuit
01:39 18 did here.

01:40 19 MR. WHITEHURST: Your Honor, you can't
01:40 20 take 10 percent and turn it into 100 percent.

01:40 21 The case law that counsel has cited to
01:40 22 was the purchase price for the entire company. Anybody
01:40 23 that's familiar with basic securities or tax laws knows
01:40 24 that certain percentage, a minority stake of a company
01:40 25 is -- the price is greatly diminished. So you can't

01:40 1 just multiply it by 10 to get the full price.

01:40 2 Here, we had two individuals that had
01:40 3 done Dr. Rao a favor, contributed some capital and then
01:40 4 later were hoping to get their capital back because
01:40 5 other circumstances had arisen.

01:40 6 So to try to look at the value that they
01:40 7 put into the company in contributed capital and then
01:40 8 got back cannot possibly reflect the value of
01:40 9 100 percent of the company where somebody has a
01:40 10 majority ownership and owns the right. That's just
01:40 11 basic securities tax for closely held corporations. So
01:41 12 it doesn't work like Mr. Lang has suggested.

01:41 13 But even greater, the patents hadn't even
01:41 14 issued yet at this time. In the 2013, none of the
01:41 15 patents had issued. And in the 2019, the '300 patent
01:41 16 hadn't even issued yet.

01:41 17 THE COURT: Mr. Whitehurst -- well, I'm
01:41 18 sorry to interrupt you. I thought you were done.

01:41 19 Why isn't the more appropriate course for
01:41 20 me to take here to order the production of this
01:41 21 information to the defendant or defendants, and if they
01:41 22 choose to use it in their damages reports and their
01:41 23 calculations, you can take it up at Daubert; and if
01:41 24 you're right that it's irrelevant, well, then they have
01:41 25 a -- they'll have some problems?

01:41 1 In other words, it seems to me -- and I
01:41 2 get why -- I'm not putting you down for -- if I were in
01:42 3 your -- I say this often. People ask why I do these
01:42 4 discovery -- you know, these discovery hearings. And
01:42 5 I've found over the course of my four years, I'd say in
01:42 6 95 percent of them I would have fought over it too on
01:42 7 both sides. So I'm not -- I think this is a very
01:42 8 legitimate issue.

01:42 9 But it seems to me in the balance of
01:42 10 equities here that what I ordinarily would do is allow
01:42 11 the discovery and -- without any prejudice to your
01:42 12 making the point that you're making and making it
01:42 13 when -- if you're right, then they'll have problems if
01:42 14 they use this information when they do their damages
01:42 15 report.

01:42 16 MR. WHITEHURST: You know, we have tried
01:42 17 to take the high road in this litigation, you know. We
01:42 18 understood that only executed licenses was the rule for
01:43 19 the case. We followed that to the letter of the -- you
01:43 20 know, we followed that very closely.

01:43 21 You know, if you're inclined to allow
01:43 22 this information, and we do intend to Daubert it out
01:43 23 later, we would only request that we be permitted to
01:43 24 provide that in a written interrogatory response form.
01:43 25 Discovery is closing tomorrow. All the witnesses have

01:43 1 already been deposed.

01:43 2 THE COURT: Let me hear from Mr. Lang. I
01:43 3 don't have a problem with that.

01:43 4 Do you have an issue with that?

01:43 5 MR. LANG: If the -- I guess what I would
01:43 6 ask Your Honor is if we can get the interrogatory and
01:43 7 later request the documents if the interrogatory
01:43 8 response does not provide all the information?

01:43 9 THE COURT: I think that's fair to both
01:43 10 sides. So -- and you can request it. Mr. Whitehurst
01:43 11 is free to take your request and decide what to do with
01:44 12 it. And if he decides to oppose it, you all can come
01:44 13 back to me and I can deal with it pretty quickly, I
01:44 14 think.

01:44 15 So let's -- on No. 4 and No. 5, I'm going
01:44 16 to order the production of this information in the form
01:44 17 of -- let me ask y'all this. Mr. Whitehurst is saying
01:44 18 he'd like to do that. Are there actually written
01:44 19 interrogatories which you can answer, Mr. Whitehurst?
01:44 20 Do you need Mr. Lang to send you the -- I mean, (audio
01:44 21 distortion).

01:44 22 MR. WHITEHURST: It was actually a
01:44 23 suggestion by Mr. Lang. So, you know, let me work with
01:44 24 Mr. Lang and Western Digital, see if there is an
01:44 25 appropriate interrogatory. I believe both sides are at

01:44 1 their limit, but we would allow them to serve an
01:44 2 additional one as a vehicle for providing this
01:44 3 information and avoiding any further deposition.

01:45 4 THE COURT: Okay. So let's do this. I'm
01:45 5 granting the relief in No. 4 and No. 5.

01:45 6 Mr. Lang, your burden is to come up
01:45 7 with -- quickly with an interrogatory that will get you
01:45 8 this information and then Mr. Whitehurst can provide it
01:45 9 in that.

01:45 10 If you are dissatisfied with the
01:45 11 information you get back and feel like you need
01:45 12 additional documents, we can decide -- take that up
01:45 13 later.

01:45 14 MR. WHITEHURST: Thank you, Your Honor.

01:45 15 THE COURT: Does that work for everyone?

01:45 16 MR. LANG: Yes, Your Honor.

01:45 17 MR. FRENKEL: Thank you, Your Honor. On
01:45 18 behalf of Western Digital, we'll work with Micron and
01:45 19 Vervain on that as well.

01:45 20 THE COURT: Very good. And sorry to
01:45 21 leave you out of that discussion.

01:45 22 MR. FRENKEL: That's okay.

01:45 23 THE COURT: Next up is No. 1, whether the
01:45 24 Court should enforce its October 14th, 2022 order and
01:45 25 require Micron to produce all licenses.

01:45 1 So I will hear -- I think it's plaintiff
01:45 2 that's asking for this. So if I'm correct, I'll start
01:45 3 with plaintiff. But if I'm wrong, I'll start with
01:46 4 defendant.

01:46 5 MR. LANG: And, Your Honor, one
01:46 6 housekeeping issue. On these next to two issues, on
01:46 7 Vervain's issues, it involves Micron confidential
01:46 8 information. So Western Digital counsel would have to
01:46 9 drop, and then we can bring them back on for the
01:46 10 last -- fifth issue, if you'd like to do it that way.

01:46 11 MR. FRENKEL: That's fine. Will somebody
01:46 12 e-mail us, I guess, when it's time to come back on
01:46 13 then?

01:46 14 MR. LANG: I believe Jennifer can just
01:46 15 right now put you to a side room and bring you back.

01:46 16 MR. FRENKEL: Okay.

01:46 17 THE COURT: Okay.

01:46 18 (Western Digital exited the hearing.)

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01:58	22	[REDACTED]
01:58	23	[REDACTED]
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01:59	25	[REDACTED]

01:59	1	[REDACTED]
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02:00	12	[REDACTED]
02:01	13	[REDACTED]
02:01	14	[REDACTED]
02:01	15	[REDACTED]
02:01	16	[REDACTED]
02:01	17	[REDACTED]
02:01	18	[REDACTED]
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02:01	23	[REDACTED]
02:01	24	[REDACTED]
02:01	25	[REDACTED]

02:01 1 [REDACTED]

02:01 2 [REDACTED]

02:01 3 [REDACTED]

02:01 4 [REDACTED]

02:01 5 [REDACTED]

02:02 6 [REDACTED]

02:02 7 [REDACTED]

02:02 8 [REDACTED]

02:02 9 [REDACTED]

02:02 10 [REDACTED]

02:02 11 [REDACTED]

02:02 12 [REDACTED]

02:02 13 [REDACTED]

02:02 14 [REDACTED]

02:03 15 [REDACTED]

02:03 16 [REDACTED]

02:03 17 [REDACTED]

02:03 18 [REDACTED]

02:03 19 [REDACTED]

02:03 20 [REDACTED]

02:03 21 [REDACTED]

02:03 22 [REDACTED]

02:03 23 [REDACTED]

02:03 24 (Western Digital entered the hearing.)

02:03 25 DEPUTY CLERK: They're back, sir.

02:03 1 THE COURT: Okay. Now, we're taking up
02:03 2 Issue No. 3, which is whether the Court should order
02:03 3 Vervain and Greenthread to produce documents regarding
02:03 4 the transfer of the SSD flash patents.

02:03 5 I will let you guys know that I feel
02:04 6 honored that on the final topic I have to take up
02:04 7 before my Thanksgiving vacation begins, I get to spend
02:04 8 this time with you all. But I certainly want to take
02:04 9 absolutely as much time as you all want to take, I'm
02:04 10 kidding -- I'm not kidding, but I do enjoy all the
02:04 11 lawyers on this hearing.

02:04 12 So I'm -- did any of you -- were any of
02:04 13 you ever -- have the good fortune to appear in front of
02:04 14 Judge Paul Luckern in the ITC?

02:04 15 MR. WHITEHURST: (Audio distortion).

02:04 16 THE COURT: So Mr. Whitehurst will know
02:04 17 what I'm talking about. I had the great good fortune
02:04 18 of appearing in front of him in the late thousands and
02:04 19 late teens. And he was -- I think the word (audio
02:04 20 distortion) at all and -- great judge. Absolutely
02:04 21 phenomenal judge.

02:04 22 But on a pretty regular basis, he would
02:04 23 lose his temper, and then he would start screaming at
02:05 24 the lawyers. And then I guess because he realized he
02:05 25 was on the record, he would start -- he would finish

02:05 1 whatever he yelled at us by saying, but you're all
02:05 2 great lawyers. Just for the record, you're all great
02:05 3 lawyers. You're all doing a great job.

02:05 4 And so ever since then, I've laughed when
02:05 5 people said, you're a great lawyer. You're doing a
02:05 6 great job. So hopefully people won't describe us in
02:05 7 exactly the same vein. Mr. Whitehurst would know, and
02:05 8 he'll probably remain silent one way or the other here.

02:05 9 So -- okay. Let me see here. Let me
02:05 10 hear from I think -- Mr. Lang, does it make sense for
02:05 11 you to go first? I think it does.

02:05 12 MR. LANG: I think so, Your Honor.

02:05 13 And this issue here is largely the same
02:05 14 with one difference than the Issues 4 and 5 that we
02:05 15 addressed first.

02:05 16 And the issue here is, it is true that
02:06 17 this patent -- you know, there was an acquisition here,
02:06 18 as I'll get into here in a second, that it wasn't the
02:06 19 asserted patents. It was these other patents called
02:06 20 the silicon flash patents.

02:06 21 Now, a couple of notable aspects: No. 1,
02:06 22 it's the same inventor, Dr. Rao; No. 2, they were owned
02:06 23 by the same company, Greenthread; No. 3, same invention
02:06 24 date, 2007 versus 2011; they relate to the same flash
02:06 25 memory.

02:06 1 I'll test your memory a little bit, Your
02:06 2 Honor, these were also asserted against Micron SSDs in
02:06 3 a case called Flash Control. That was in front of you.
02:06 4 These patents dealt with moving data around/address
02:06 5 mapping, the same type of techniques that are at issue
02:06 6 here. In fact, these patents were even offered
02:07 7 together in patent sales.

02:07 8 Now, so -- but in this case, as you know,
02:07 9 Micron's produced dozens and dozens of licenses that
02:07 10 don't cover the asserted patent. We just talked about
02:07 11 the Round Rock licenses, Lexar licenses, other
02:07 12 licenses.

02:07 13 And as you well know, Your Honor, even if
02:07 14 it's not the asserted patent, a license or patent can
02:07 15 be comparable. These certainly are the most comparable
02:07 16 of anything we've looked at.

02:07 17 Now, what we know is that from sworn
02:07 18 testimony -- and I'll note for the record, in our table
02:07 19 dispute there is a citation issue where we cited 126:3
02:07 20 through 6. It actually should be 127. And, in fact,
02:07 21 that sentence, those citations are one page off.

02:07 22 But what that testimony shows was that
02:08 23 there were some minimal payments made for these
02:08 24 patents. That's just sworn testimony. So all we want
02:08 25 to know is how -- what those payments were.

02:08 1 Now, Vervain claims that that's
02:08 2 privileged. But we'll -- again, we're willing to
02:08 3 accept an interrogatory answer that would tell us what
02:08 4 those payments were. And then that would exclude if
02:08 5 it's part of a privilege document, for example.

02:08 6 THE COURT: Response?

02:08 7 MR. WHITEHURST: Yes, Your Honor. Just a
02:08 8 second. I believe, Mr. Lang, there you go.

02:08 9 I feel like this is déjà vu all over
02:08 10 again because we've dealt with a very similar situation
02:08 11 back in the August 2nd discovery hearing.

02:08 12 There Micron was trying to get discovery
02:08 13 into monetization of certain patents. Actually, it was
02:09 14 monetization of the asserted patents. Here, we're even
02:09 15 further removed.

02:09 16 We're dealing with a situation where it's
02:09 17 not monetization of the asserted patents but unasserted
02:09 18 patents. And my hands are tied here because they're
02:09 19 really trying to get discovery into a privileged
02:09 20 document that I can't discuss here.

02:09 21 We're not waiving privilege. We can't go
02:09 22 there. We can't produce the document. We're talking
02:09 23 about something that's unrelated. They're trying to
02:09 24 get behind the curtain, see what happened in a
02:09 25 privileged arrangement by trying to get to the -- these

02:09 1 payments.

02:09 2 But there was -- this is not a situation
02:09 3 where they're asking for licenses. We're talking
02:09 4 about, number one, Greenthread. It's not a party to
02:09 5 this litigation. It's a separate company.

02:09 6 This Greenthread-Si Flash agreement that
02:10 7 they want discovery into does not involve the asserted
02:10 8 patents, as counsel has already mentioned. It's a
02:10 9 privileged agreement between Greenthread and an
02:10 10 attorney.

02:10 11 And the Court has consistently said --
02:10 12 and this is something that we've followed throughout
02:10 13 this case. The Court has only required the production
02:10 14 of executed licenses.

02:10 15 And you'll see here that when Micron
02:10 16 argued at the previous hearing that they wanted
02:10 17 discovery into the monetization of the asserted
02:10 18 patents -- here we're talking about monetization of
02:10 19 unasserted patents -- you said, well, that's all in my
02:10 20 court I require people to produce, these executed
02:10 21 licenses.

02:10 22 That's what we've understood the rule of
02:10 23 the game, the rule of the Court to be, and we followed
02:10 24 that.

02:10 25 So Greenthread is not aware of any

02:10 1 licenses by Si-Flash. And the patents -- it's even
02:10 2 further removed now. The patents have since been
02:10 3 assigned to this other entity, Flash Control.

02:10 4 So when the Court previously dealt with
02:10 5 this issue on monetization of the asserted patents --
02:11 6 my apologies -- the Court said that it doesn't require
02:11 7 production of documents related to prior monetization
02:11 8 efforts, just the executed licenses.

02:11 9 Here, we're talking about a third party
02:11 10 and unasserted patents. So we don't believe there's
02:11 11 any precedent for providing this requested information
02:11 12 that goes to a privileged relationship between a third
02:11 13 party and counsel.

02:11 14 THE COURT: Help me here. I'm not -- I'm
02:11 15 not understanding why this is privileged. The -- I'm
02:11 16 not understanding why the information that Micron is
02:11 17 seeking here, that -- just that information, is
02:12 18 privileged.

02:12 19 It seems to me it's an amount, and so I
02:12 20 don't know why that would be privileged.

02:12 21 MR. WHITEHURST: That's correct, Your
02:12 22 Honor. The amount itself, though, goes to what was
02:12 23 monetization of unasserted patents. It's not the
02:12 24 license agreement itself.

02:12 25 It was a strange relationship that I

02:12 1 can't go into because of the privileged nature, but
02:12 2 we're not talking about a license agreement. There's
02:12 3 nothing here that's going to show what the parties
02:12 4 would have paid at a hypothetical negotiation.

02:12 5 It was a weird arrangement, a privileged
02:12 6 relationship that did result in a payment. But the
02:12 7 nature of that and the payment would be revealing the
02:12 8 substance, the privileged relationship, and it's not
02:12 9 going to a license or something that we would actually
02:12 10 use in a Georgia-Pacific reasonable royalty
02:12 11 calculation.

02:12 12 THE COURT: Let me hear a response.

02:12 13 MR. LANG: Your Honor, I think you hit it
02:13 14 on the head. The amount cannot be privileged. And
02:13 15 whether it was a weird relationship or not, in
02:13 16 Mr. Whitehurst's words, we're entitled to assess how
02:13 17 that affects damages.

02:13 18 The main point that Mr. Whitehurst fell
02:13 19 back on after realizing it's not privileged is that
02:13 20 these are unasserted patents.

02:13 21 We -- there's got to be 40 licenses
02:13 22 produced in this case on unasserted patents, Round
02:13 23 Rock, Lexar, go on. These patents are the same subject
02:13 24 matter. We just want to know what these payments were
02:13 25 for, how much were they.

02:13 1 And again, Your Honor, we would be open
02:13 2 to handling this in the same way. An interrogatory
02:13 3 response should obviate the privilege issues of the
02:13 4 documents Mr. Whitehurst is referring to.

02:13 5 MR. WHITEHURST: But, Your Honor, a
02:13 6 single payment is not going to show what a party would
02:14 7 have paid in a hypothetical license negotiation. So
02:14 8 I'm struggling to see how there's any relevance at all
02:14 9 to the Georgia-Pacific factors.

02:14 10 You know, if we were talking about an
02:14 11 executed license agreement or something of that nature,
02:14 12 it would be a completely different case, but here
02:14 13 they're trying to inquire into a single payment for
02:14 14 unasserted patents outside of the scope of a license
02:14 15 agreement.

02:14 16 That's really stretching the realm of
02:14 17 relevancy. And it's something that, you know, we
02:14 18 always understood to be out of bounds. And to know --
02:14 19 if they were asking for the production of a license
02:14 20 agreement or something, we would have certainly
02:14 21 complied with that request, but that's not what they're
02:14 22 asking for here.

02:15 23 (Clarification by Reporter.)

02:15 24 MR. FRENKEL: Okay. Sorry.

02:15 25 You know, we weren't involved in the

02:15 1 earlier fight between Micron and Vervain, but it seems
02:15 2 to me that getting the information about what the --
02:15 3 what Greenthread got for transferring these patents to
02:15 4 Si-Flash and any information about what percentage they
02:15 5 would get in the future, you know, is probative in
02:15 6 discovery.

02:15 7 I mean, we may or may not use it in
02:15 8 expert reports, but we can't decide that until we see
02:15 9 it. You know, it seems like the arguments that counsel
02:15 10 for Vervain are making are more directed towards
02:15 11 Daubert or motions in limine and not for discovery.

02:15 12 MR. WHITEHURST: Well, again, Your Honor,
02:15 13 we believe, you know, just like the Court has
02:15 14 consistently held that funding agreements, contingency
02:15 15 retention agreements, we're talking here about a
02:15 16 privileged relationship. And they're trying to peer
02:15 17 behind the curtain, and that's a very dangerous
02:15 18 situation.

02:15 19 You know, we understand privilege to be
02:16 20 something that, you know, if we had decided to waive,
02:16 21 that'd be one thing, but we've been very consistent in
02:16 22 this litigation with what we view to be privileged.
02:16 23 And they're trying to get to the nature of that
02:16 24 privileged relationship.

02:16 25 And again, we don't believe that they've

02:16 1 established anything showing that it's relevant to
02:16 2 Georgia-Pacific or the reasonable royalty rate.
02:16 3 They're just trying to look where they're not permitted
02:16 4 to look.

02:16 5 MR. LANG: Your Honor, if I may, maybe
02:16 6 there's a middle-ground first step here, and this
02:16 7 agreement is with the same inventor, the sole -- he's
02:16 8 the sole inventor on both patents. So we think it's
02:16 9 highly relative to what he would be thinking at the
02:16 10 hypothetical negotiation.

02:16 11 If you would, maybe you can put the onus
02:16 12 on Micron and Vervain to craft an interrogatory
02:16 13 response that seeks, for example, the, you know, the
02:16 14 payments, which can't be privileged. And we can get
02:17 15 their response and deal with it if we think that they
02:17 16 are over-applying, you know, the privilege brush, so to
02:17 17 speak.

02:17 18 THE COURT: Anything else from anyone?

02:17 19 Okay. I'll be back in a second.

02:17 20 (Pause in proceedings.)

02:17 21 THE COURT: If we could go back on the
02:17 22 record.

02:17 23 The last suggestion I think was a good
02:17 24 one, and I will take it. So how quickly do you think
02:17 25 you can get an interrogatory to Mr. Whitehurst?

02:17 1 MR. LANG: Mr. Frenkel, I think we could
02:17 2 probably put our heads together and get that done by
02:17 3 Friday, right?

02:17 4 MR. FRENKEL: Yes. Definitely.

02:17 5 THE COURT: Okay. Then I would assume,
02:17 6 Mr. Whitehurst, you could relatively quickly get the
02:18 7 interrogatory answered?

02:18 8 MR. WHITEHURST: Yes, Your Honor.
02:18 9 Assuming there are no privilege issues. Yes, Your
02:18 10 Honor.

02:18 11 THE COURT: Okay. Well, let me just say
02:18 12 that if it's asking for the amount, I would not find
02:18 13 that to be privileged. So if that helps guide the
02:18 14 drafters of the interrogatory.

02:18 15 Anything else we need to take up,
02:18 16 Mr. Whitehurst?

02:18 17 MR. WHITEHURST: No, Your Honor. Thank
02:18 18 you. Thank you for your time. I'm always nervous when
02:18 19 I'm keeping a district judge from his Thanksgiving
02:18 20 holiday.

02:18 21 THE COURT: Well, fortunately, it doesn't
02:18 22 happen all that often. So I have a feeling that many
02:18 23 of my brethren started this holiday last Friday.
02:18 24 That's probably what I should have done as well.

02:18 25 MR. WHITEHURST: I think that's a safe

02:18 1 assumption.

02:18 2 THE COURT: The fault here is mine for
02:18 3 not planning my vacation better.

02:18 4 So you guys have a wonderful
02:18 5 Thanksgiving, and I hope to see y'all soon in person.
02:18 6 Take care.

02:18 7 (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
9 the above-entitled matter.

10 I certify that the transcript fees and
11 format comply with those prescribed by the Court and
12 Judicial Conference of the United States.

13 Certified to by me this 26th day of
14 November 2022.

15
16 /s/ Kristie M. Davis
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